STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2011
v	No. 295199 Muskegon Circuit Court
JOEL GLENN PETZ, Defendant-Appellant.	LC No. 08-057074-FH

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of failing to register as a sex offender, MCL 28.729, and failing to verify his domicile or residence, MCL 28.725a. The trial court sentenced defendant as a habitual offender, fourth-offense, MCL 769.12, to a term of 48 months to 15 years' imprisonment, with credit for four days. Defendant appeals as of right. We affirm.

I. TEXT MESSAGE

Defendant first contends on appeal that the trial court erred in admitting a "text message"[1] on chain of evidence grounds. Specifically,

[1] Actually, it was an instant message. See http://en.wikipedia.org/wiki/Instant_messaging:

> IM falls under the umbrella term online *chat*, as it is a real-time text-based networked communication system, but is distinct in that it is based on clients that facilitate connections between specified known users (often using "Buddy List", "Friend List" or "Contact List"), whereas online 'chat' also includes web-based applications that allow communication between (often anonymous) users in a multi-user environment. . . . Instant messaging . . . is a collection of technologies used for real-time text-based communication between two or more participants over the Internet . . . . Of importance is that online chat and instant messaging differs from other technologies such as e-mail due to the perceived synchronicity of the communications by the users –chat happens in real-time.

> there was no testimony to establish there were no breaks in the chain of evidence showing it was actually sent by [Jodie] Christiansen to Dawn Delapaz and received by the police in the exact condition from whom and where it was sent, and then it was preserved in the exact condition it was received not from [Officer] Baker but from Officer Hough, who did not testify, to Baker and then to court.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

As to defendant's chain of evidence assertion, we find this argument meritless, because the message was not *real* evidence to which chain of evidence issues apply. See *People v White*, 208 Mich App 126, 129-130; 527 NW2d 34 (1995) ("[W]hen real evidence is offered an adequate foundation for admission will require testimony first that the object offered is the object which was involved in the incident, and further that the condition of the object is substantially unchanged."). "Real evidence" is defined as "[e]vidence furnished by things themselves, on view or inspection, as distinguished from a description of them by the mouth of a witness." Black's Law Dictionary (5th ed.). Here, the evidence of the message was all testimonial evidence. Dawn Delapaz and Officer Baker both testified that they saw the message on Delapaz's computer screen and recited verbally to the jury the contents of the message. There was no physical or real evidence presented regarding the message. Accordingly, chain of evidence issues are irrelevant.

We also find no merit in defendant's contention that the message was inadmissible hearsay. Hearsay, by definition, must be offered into evidence "to prove the truth of the matter asserted." MRE 801(c). Here, the content of the message was: "[T]he cops just picked [defendant] up. Please tell them that he lives there with you guys and he sleeps on your couch, please, please, please." The statement was not admitted to prove either that the cops picked defendant up, or that defendant lived with the Delapaz's and slept on their couch. Rather, it was admitted to counter the defense that defendant's failure to register and verify his address was a misunderstanding or mistake by law enforcement. Thus, the truth or falsity of the statement was irrelevant, rendering the statement not hearsay and, therefore, admissible. *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994).[2]

II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to sustain his convictions. We review de novo claims of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

Defendant contends that there was insufficient evidence of criminal intent not to register and verify his address because he was a homeless person who lived at at least two different

[2] Because we conclude that the statement was not hearsay, we need not address defendant's assertion that the trial court erred in concluding that it was admissible under one of the exceptions to the hearsay rule.

addresses.[3] Defendant relies on *People v Dowdy* (*After Remand*), 287 Mich App 278; 787 NW2d 131 (2010), lv granted 486 Mich 935 (2010). In *Dowdy*, this Court held that a homeless person is exempt from the reporting requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., because he does not have a domicile or a residence. *Id.* at 281. However, *Dowdy* is inapplicable to the present case.

First, defendant's assertion of homelessness is contrary to his defense at trial, which was that he did, in fact, comply with the statute and that he simply lost his receipts and that law enforcement somehow messed up to prevent the records from showing that he had done so. Second, the facts proved that defendant had several residences. Defendant was initially registered at a residence in White Cloud, but he left on March 16, 2008. Delapaz and her husband testified that defendant then lived in their home at 3019 Peck Street until roughly August 2008. According to defendant and Jodie Christensen, defendant continued to live at 3019 Peck Street until October of 2008 when he was arrested. This factual dispute over where defendant lived from August through October 2008 did not change the record evidence that, during the relevant time periods for which defendant was convicted of failing to register (April 2008) and verify his address (July 2008), defendant had a place to live or accommodations in a house. Accordingly, defendant was not homeless and *Dowdy* is inapplicable. See *id.* at 281.

III. SENTENCING

Defendant next provides a litany of reasons that his sentencing is unconstitutional, all of which are meritless. Defendant asserts that the trial court relied on inaccurate sentencing information. However, defendant *twice* expressed his wish to waive all objections to his PSIR report:

> *The Court*: . . . [Defense counsel] said you just want to waive all your objections, drop it, and be sentenced today.
>
> *Defendant*: That is true, your honor.
>
> *The Court*: Is that what you want to do?
>
> *Defendant*: I've ran [sic] and hid and did all this stupid stuff for long enough and even if it came back that I was telling the truth that all this was right and everything got changes, it's not gonna effect the sentence far enough to make it worth all the hassle. I just want it done and I want to start and get my life started again.
>
> *The Court*: Well, I appreciate that, but you need to understand something. That this becomes your resume with the Michigan Department of Corrections.

[3] Although we have elected to address this issue, we note that we need not do so, given that defendant's assertion of homelessness is before us for the first time on appeal without having been presented to the trial court. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

> And the parole board uses it and the Department of Corrections. The Department of Corrections wi[ll] use it first to determine where to house you and what security level you are going to be. The parole board will use it later when you come up for parole. So, there's a lot riding on getting this right. But, like I said, I already dictated the order, to have the probation agent do some more digging. And what he might to, he might actually start by looking at the transcripts of the sentences you've had in these other courts to see whether you challenged the accuracy of the information in the[m]. So, I think it's one of those things you can waive if you want to but you're stuck with it from this point on.
>
> *Defendant:* I'll waive the objection that I had earlier.

Having expressly waived all of his objections to the accuracy of the sentencing report, defendant may not now rely on any alleged inaccuracy to claim his sentence is inappropriate. "'A defendant may not waive objection to an issue before the trial court and then raise it as an error' on appeal." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Defendant next asserts that the trial court failed to give appropriate consideration to mitigating evidence. In a similar vein, defendant also argues that the trial court failed to explain why the minimum and maximum sentences were proportionate to his offense and that his sentence is disproportionate. First, "[t]he articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence . . . ." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Second, a sentence within the sentencing guidelines range is presumptively proportionate and a proportionate sentence does not amount to cruel or unusual punishment. *People v Powell*, 278 Mich 318, 323; 750 NW2d 607 (2008); see also *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006) (holding that *Blakely v Washington*, 542 US 296; 124 S Ct 1531; 159 L Ed 2d 403 (2004) is inapplicable to Michigan's indeterminate sentencing scheme).

Here, defendant's sentence falls within the guidelines range, defendant has alleged no scoring errors, and defendant waived any objection to the accuracy of the report. Defendant's claims that he had no prior convictions for failure to comply, enjoys family support, is remorseful, and has a substance abuse history are ordinary circumstances that do not detract from his culpability. Thus, defendant has failed to assert any viable legal premise for his claim of unlawful sentencing. Accordingly, this Court must affirm defendant's sentence. See MCL 769.34(10); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003) (If a trial court's sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence.").[4]

[4] Although this Court held in *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006) that MCL 769.34(10) is inapplicable to claims of constitutional error, because defendant has

IV. JURY OATH

Finally, defendant asserts in his Standard 4 brief on appeal that the trial court violated his constitutional rights by permitting the trial to proceed without requiring the jury to swear or affirm to give an honest verdict based solely on the evidence. The transcript provided to this Court did not evidence the jury being given an oath. Accordingly, this Court remanded the case to the trial court to make a determination whether the jury had been sworn before trial commenced. *People v Petz*, unpublished order of the Court of Appeals, entered September 30, 2010 (Docket No. 295199). On remand, the trial court determined that the recording system in the courtroom had been malfunctioning and the trial was moved to another courtroom until the problem was solved. A CD existed of the proceedings from the other courtroom, which was viewed by the trial judge and his court officer and which showed the trial judge administering the oath to the jury panel in the morning and the jury itself in the afternoon. The court officer for the other courtroom, who was responsible for operating and maintaining the recording system in that courtroom, provided an affidavit corroborating those facts. In light of these facts, we conclude that the jury was given the oath as required.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens

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failed to overcome the presumption that his sentence is proportionate, there is no constitutional error.